

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
CLERK

1:52 pm, Jul 26, 2019

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LYNN KLEIMAN, individually and as
representative of the Estate of Ora Levine,

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

Plaintiff,

ORDER

18-CV-4172 (SJF)(GRB)

- against-

KINGS POINT CAPITAL MANAGEMENT, LLC,
and JEFFREY BATES,

Defendants.

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FEUERSTEIN, District Judge:

Before the Court is a Report and Recommendation (“the Report”) of the Honorable Gary R. Brown, United States Magistrate, dated July 11, 2019, *see* Docket Entry (“DE”) [54], recommending that defendants’ motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure be deemed withdrawn without prejudice to refiling. The Report further advised the parties, *inter alia*, (1) that “[a]ny written objections to th[e] Report . . . must be filed with the Clerk of the Court within fourteen (14) days of service,” and (2) that a “[f]ailure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or the Court of Appeals.” Report at 3 (emphasis omitted) (citing 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(A), 72(b); *Meija v. Roma Cleaning, Inc.*, 751 F. App’x 134, 136 (2d Cir. 2018); *Caidor v. Onondaga Cty.*, 517 F.3d 601, 604 (2d Cir. 2008)). Although a copy of the Report was served upon counsel for all parties via ECF on the date it was issued, no objections have been filed, nor has any party sought an extension to do so. For the reasons set forth below, Magistrate Judge Brown’s Report is adopted in its entirety.

I. DISCUSSION

A. Standard of Review

Any party may serve and file written objections to a report and recommendation of a

magistrate judge within fourteen (14) days after being served with a copy thereof. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(2). Any portion of such a report and recommendation to which a timely objection has been made is reviewed *de novo*. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(3). However, the Court is not required to review the factual findings or legal conclusions of the magistrate judge as to which no proper objections are interposed. *See Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). Indeed, “[w]here parties receive clear notice of the consequences, failure to timely object to a magistrate’s report and recommendation operates as a waiver of further judicial review of the magistrate’s decision.” *Smith v. Campbell*, 782 F.3d 93, 102 (2d Cir. 2015) (quoting *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002)).

Nonetheless, the waiver rule is “nonjurisdictional” and, thus, the Court may excuse a violation thereof “in the interests of justice.” *King v. City of N.Y., Dep’t of Corr.*, 419 F. App’x 25, 27 (2d Cir. 2011) (summary order) (quoting *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993)); *see also DeLeon v. Strack*, 234 F.3d 84, 86 (2d Cir. 2000). “Such discretion is exercised based on, among other factors, whether the defaulted argument has substantial merit or, put otherwise, whether the magistrate judge committed plain error in ruling against the defaulting party.” *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 174 (2d Cir. 2000); *accord King*, 419 F. App’x at 27.

To accept the magistrate’s report and recommendation absent a timely objection, the court need only be satisfied that there is no clear error on the face of the record. *See* FED. R. CIV. P. 72(b); *Baptichon v. Nevada State Bank*, 304 F. Supp. 2d 451, 453 (E.D.N.Y. 2004), *aff’d*, 125 F. App’x 374 (2d Cir. 2005). Whether or not proper objections have been filed, the district

judge may, after review, accept, reject, or modify any of the magistrate judge's findings or recommendations. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

B. Review of the Report

No party has filed objections to the Report within the time prescribed in 28 U.S.C. §636(b)(1)(C), nor has any party sought an extension of the deadline. As the parties were provided with adequate notice of the Report and an express warning of the consequences of a failure to timely file objections thereto, their failure to interpose timely objections to the Report operates as a waiver of further judicial review. *See Caidor*, 517 F.3d at 602-03; *Mario*, 313 F.3d at 766. Thus, this Court is not obligated to conduct a *de novo* review of the findings and conclusions in the Report, but rather “need only satisfy itself that there is no clear error on the face of the record to accept a magistrate judge’s report and recommendation.” *Safety-Kleen Sys., Inc. v. Silogram Lubricants Corp.*, No. 12-CV-4849, 2013 WL 6795963, at *1 (E.D.N.Y. Dec. 23, 2013). After a careful review of the Report, the Court finds no plain error in either the reasoning or the conclusions reached therein, and accordingly, adopts it in its entirety.

II. CONCLUSION

The Report is adopted in its entirety, and the motion to dismiss, DE [52], is deemed withdrawn. Defendants may refile the motion **by October 31, 2019**. Consistent with this Court’s rules, the parties may establish a consensual briefing schedule to meet this deadline. *See* Individual Rule 4(D)(ii). Should defendants decide to forego resubmission of the motion, they must notify the Court by electronically-filed letter no later than **September 5, 2019**.

The status conference scheduled for October 2, 2019 is adjourned to **December 4, 2019**
in courtroom 1010 of the Central Islip courthouse.

SO ORDERED.

/s/

Sandra J. Feuerstein
United States District Judge

Dated: July 26, 2019
Central Islip, New York